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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOE GARCIA, FERNANDO QUILES,	)	CIVIL ACTION
DALIA RIVERIA MATIAS,	)	
	)	No. 2:12-cv-00556-RBS
Plaintiffs,	)	
	)	
v.	)	
	)	
2011 LEGISLATIVE	)	
REAPPORTIONMENT COMMISSION	)	
and CAROL AICHELE, IN HER	)	
CAPACITY AS SECRETARY OF THE	)	
COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

**MEMORANDUM OF LAW OF SENATOR JAY COSTA  
AS AMICUS CURIAE OPPOSING PLAINTIFFS' REQUEST FOR A PRELIMINARY  
INJUNCTION AND THE APPOINTMENT OF A SPECIAL MASTER**

Senator Jay Costa files the following Memorandum of Law as *amicus curiae* in this matter:

**STATEMENT OF INTEREST**

Jay Costa is (a) a member of Pennsylvania's 2011 Legislative Reapportionment Commission ("LRC" or "Commission"), a defendant in this action, and the body charged with the constitutional obligation to adopt and approve a reapportionment plan that complies with the Pennsylvania and United States' Constitution; (b) a petitioner in one of the reapportionment appeals that remains within the jurisdiction of the Pennsylvania Supreme Court; (c) a State Senator; (d) the Minority Leader of the Pennsylvania Senate; and (e) a voter in Pennsylvania. Senator Costa respectfully submits the Memorandum of Law in this proceeding and urges this

Court to defer to the reapportionment process currently underway in Pennsylvania and deny the Motion for Preliminary Injunction of Plaintiffs Joe Garcia, Fernando Quiles and Dalia Riveria Matias and the Plaintiffs' subsequent request that this Court appoint a special master to oversee the reapportionment process, because the reapportionment process "is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978).

### **STATEMENT OF FACTS**

Once every 10 years, the Pennsylvania Constitution requires that the LRC convene to reapportion the districts for all of the seats of the Pennsylvania General Assembly. A reapportionment plan must comply with the Constitution's parameters of compact and contiguous districts, equal in population, without unnecessary divisions of counties or municipalities. With its January 25, 2012 Order, followed by an 87-page Opinion issued on February 3, 2012, the Pennsylvania Supreme Court rejected the LRC's reapportionment plan as unconstitutional and "recalibrated" the co-existing mandates in Article II, Section 16 of the Pennsylvania Constitution. *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711 (2012)(the "Holt Opinion"). The Supreme Court remanded the reapportionment proceeding to the LRC, retaining jurisdiction until the Court finally approves a constitutional plan.

Joe Garcia, Fernando Quiles, and Dalia Riveria Matias ("Plaintiffs") filed the instant action on February 2, 2012, to prevent the state from using the existing legislative districts for the 2012 elections.<sup>2</sup> This Court rejected the Plaintiffs' request for injunctive relief and permitted the 2012 elections to proceed using the existing legislative districts. On June 8, 2012, the LRC adopted a new reapportionment plan (the "2012 Final Plan") over the objection of Senator Costa.

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<sup>2</sup> Two other groups also filed suit to prevent the use of the existing reapportionment plan in the 2012 elections.

Pursuant to Section 17(d) of the Pennsylvania Constitution, aggrieved parties have thirty days to file appeals with the Pennsylvania Supreme Court. Thirteen appeals were filed, including an appeal by Senator Costa.

On June 29, 2012, three weeks after the LRC adopted the 2012 Final Plan, the Plaintiffs' filed a Motion for Preliminary Injunction asking that this Court take over Pennsylvania's legislative reapportionment process. The Plaintiffs asked this court to shorten the terms of the legislators to be elected at the 2012 general election and to schedule a special election in 2013 for those legislative seats.

The Pennsylvania Supreme Court heard oral argument regarding the LRC's 2012 Final Plan on September 13, 2012. If the Pennsylvania Supreme Court approves the 2012 Final Plan it will attain the force of law and be used for future elections to the General Assembly. Alternatively, if the Supreme Court rules that the 2012 Final Plan does not comport with the requirements of the Pennsylvania Constitution, it has sufficient time to ensure that a new plan be in place prior to the beginning of 2014 when the election process would begin.

### ARGUMENT

**A. Ordering Special Elections for the Pennsylvania General Assembly Would Countermand the Expectations of Pennsylvania's Voters and Elected Officials and Undermine the Stability of the Pennsylvania Legislature**

In the seminal case of *Reynolds v. Sims*, the U.S. Supreme Court established the principle that each state must maintain "a reasonably conceived plan" for periodic reapportionment. *Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964). The United States Supreme Court has held several times that the duty to carry out periodic reapportionment lies with state legislatures and not with federal courts. See *Chapman v. Meier*, 420 U.S. 1, 27 (1975). For this reason, the United States Supreme Court has never established a black line with respect to how long after a

decennial census a state must complete reapportionment. See *French v. Boner*, 963 F.2d 890, 891-92. Federal courts have refused to offer relief both prior to and following elections that occur on the cusp of decennial reapportionment. *Id.*; *Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7<sup>th</sup> Cir. 1992).

This court refused to provide the Plaintiffs with injunctive relief prior to the 2012 elections. In its February 8, 2012 Order, the court stated that "there is no indication that the Commonwealth has adamantly refused to comply with constitutional mandates and court orders." *Pileggi v. Aichele*, 843 F. Supp.2d 584, 594 (E.D. Pa. 2012). To the contrary, the LRC and Supreme Court acted to fulfill their constitutional roles. For this reason and to avoid the uncertainty that would follow if the 2012 elections were delayed, this Court permitted the 2012 elections to proceed using the existing reapportionment plan.

Plaintiffs now seek to have this Court cut short the terms of the legislators elected in the 2012 elections. Numerous federal courts have refused to cut short the terms of legislators elected on the cusp of a decennial census, even where the terms of the legislators would continue into the middle of a decade. See *French*, 963 F.2d 890; *Daley*, 976 F.2d 335. In *French*, the Sixth Circuit held that the City of Nashville was not required to hold new elections for 35 local legislators elected to four-year terms using an eleven year old reapportionment plan. 963 F.2d at 892. The court stated that while the representatives would serve "five years into the decade of the 1990s" under a 15 year old reapportionment plan, the "considerations of mathematical equality in representation" did not outweigh considerations such as the validity of four-year terms, the settled expectations of voters and elected officials, the cost of elections, and the need for stability and continuity in office. *Id.*

The Seventh Circuit, citing *French*, applied similar reasoning in *Daley*. There, the plaintiff-voters alleged that their voting rights would be violated if Chicago's 1991 aldermanic elections were allowed to proceed pursuant to the existing districts based on the 1980 census. 976 F.2d at 337. The district court dismissed the claim because the City of Chicago employed "a rationally conceived plan, tied to the decennial census, to accomplish the necessary periodic adjustment" despite the fact that the alderman would be elected under the existing map after census figures were available. *Id.* at 338. The Seventh Circuit Court affirmed, noting that *Reynolds* explicitly contemplated that there would be a probable imbalance in a district map at the end of a decennial period. *Id.* at 340. For these reasons, there was no requirement that Chicago "change its customary four-year term length for aldermen" to avoid the imbalance toward the end of a decennial period. *Id.* at 340-341.<sup>3</sup>

This Court should refuse to alter the terms of the legislators elected at the 2012 elections for the same reasons. This Court stated in its 2012 order that the Commonwealth has complied with its obligations and has not unreasonably delayed the reapportionment process. The considerations of mathematical equality do not outweigh the validity of the two-year and four-year terms to which legislators in Pennsylvania are elected. Further, the concern for mathematical equality does not justify requiring the Commonwealth to bear the immense expense of elections for 203 Representatives and 25 Senators who would serve only partial terms.

Further, if this Court were to order special elections in 2013 or 2014, the political system in Pennsylvania would be destabilized. Legislators currently in office would be prematurely

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<sup>3</sup> The cases cited by Plaintiffs in support of the contention that this Court should limit the terms of legislators elected at the 2012 are different in one very important respect: in most of the cases the court held that the legislators would serve shortened terms *prior to* the elections in question, therefore addressing the expectations of voters and elected officials in the first instance. See *Smith v. Beasley*, 946 F. Supp 1174 (D.S.C. 1996).

distracted from the important issues currently facing Pennsylvania. Hopeful candidates would be uncertain in which districts they would run. Legislation currently being considered in the General Assembly could be delayed until replacement legislators are seated. Moreover, the legislators elected during the special elections would be required to campaign for elections in 2014 as well. The potential consequences of ordering special elections are of far greater consequence than permitting the legislators to finish their terms. The Pennsylvania Supreme Court will soon resolve this matter, so there is no need for Federal Court intervention now.

**B. Appointing a Federal Court Special Master Would Unnecessarily Undercut the Reapportionment Process Taking Place in Pennsylvania<sup>4</sup>**

As this court recognized with its Order in *Pileggi*, a federal court should not take on the unwelcome duty of creating a redistricting plan unless state legislators and courts will fail to timely perform their duty. *Pileggi v. Aichele*, 843 F. Supp.2d 584, 592-95 (E.D. Pa. 2012); see also *Grove v. Emison*, 507 U.S. 25 (1993). A close examination of the cases cited by plaintiff highlights the reluctance of federal courts to undertake reapportionment on their own. See, e.g., *Ketchum v. City Council of City of Chicago, Ill.*, 630 F. Supp. 551 (N.D. Ill. 1985)(upon remand court permitted citizens and elected officials to intervene and the parties agreed to a map); *Smith v. Beasley*, 946 F. Supp. 1174, 1213 (D.S.C. 1996)(providing the South Carolina legislature with an opportunity to create a plan during its next legislative session). In each of these cases, the federal court provided the government with further opportunity to produce a reapportionment plan *after* the court held that the existing reapportionment plan was illegal.<sup>5</sup>

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<sup>4</sup> In an effort to minimize its burden on this honorable Court, *amicus curiae* will not address in detail the abstention and deferral arguments set forth in the briefs filed by other *amicus curiae*.

<sup>5</sup> The term "illegal" is used to distinguish between reapportionment that violates the Equal Protection Clause, as Plaintiffs' allege here, and reapportionment plans or elections that fail for some other reason, including some form of unintentional racial discrimination.

This Court has already recognized that the Commonwealth has not adamantly refused to comply with constitutional deadlines. Contrary to the Plaintiffs' assertions, the Commonwealth has not ignored the "deadlines" for reapportionment.<sup>6</sup> Upon remand by the Pennsylvania Supreme Court, the Commission was required to make alterations to its initial plan, and comply with a 30 day public comment period after passing a new preliminary plan. The Commission passed a revised reapportionment plan and the Supreme Court permitted the public to file appeals -- all as required by the Pennsylvania Constitution. The failure to have a reapportionment plan based on the 2010 census figures in place is related not to any affirmative failures -- but to the Pennsylvania Supreme Court's discharge of its duties in the form of the 87-page *Holt Opinion* and the remand proceedings that followed. Given the current procedural status, there is no reason to believe that the Commonwealth will not have fully discharged its duties in time for the next election cycle.

In this context, there is no compelling justification for this Court to take over the reapportionment process currently underway in Pennsylvania by appointing a federal court special master. The Plaintiffs' have asked this Court to set a deadline of March 1, 2013 for the Commonwealth to produce a legally valid reapportionment plan based on the 2010 census. This deadline is completely unrealistic. If this Court were to adopt the Plaintiffs' proposed deadline of March 1, 2013 for the enactment of a new reapportionment plan, it would essentially be competing with the Pennsylvania Supreme Court.<sup>7</sup> If this Court adopts the deadline suggested by the Plaintiffs, the Commission would not be left with sufficient time to allow for even the first

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<sup>6</sup> Notably, the Plaintiffs refer to a ten-year "deadline" specified in *Reynolds*. However, the *Reynolds* court made it clear that some imbalance was to be expected at the end of a ten-year period and did not hold that ten years was a "deadline" for reapportionment.

<sup>7</sup> The Defendants in this action and other *amicus curiae* have set forth the principles of abstention that a federal court should follow when a state court is considering a reapportionment matter.

30 day comment period required by the Pennsylvania Constitution. See Pa. Const. Art. II, s. 17. Further, the process of elections would be placed in a chaotic state, as this deadline would not provide for the appropriate selection of candidates, obtaining nomination papers, filing appropriate challenges, and other actions required to meet the statutory requirements imposed by the Pennsylvania Election Code.

For these reasons, the Plaintiffs request for special relief, and the appointment of a special master should be denied.

Respectfully Submitted,  
COHEN & GRIGSBY, P.C.

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